STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

(Judges Fitzgerald, Hoekstra and Markey)

STATE TREASURER,

Plaintiff-Appellant,

v

THOMAS K. ABBOTT,

Defendant-Appellee.

and

AUTO BODY CREDIT UNION and
JOANN A. ABBOTT,
Defendants.

______________________________ /

Michigan Supreme Court No. 120803

Court of Appeals No. 223567

Clinton Circuit Court No. 97-008368-CZ

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

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RECEIVED
JUN 21 2002
CORBIN R. DAVIS
CLERK SUPREME COURT

Dated: June 19, 2002

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QUESTIONS PRESENTED FOR REVIEW

I. Where requiring an inmate to cause his or her pension payments to be deposited into their own personal account is neither assignment nor alienation, can federal law prohibiting the assignment or alienation of pension payments preempt enforcement of Michigan's law requiring financially able prison inmates to reimburse taxpayers for incarceration expenses?

II. Can federal law, which mandates that pension payments be made to the pensioner, be used to prevent the enforcement of Michigan's law requiring financially able prison inmates to reimburse taxpayers even after the payment has been made and deposited in the pensioner's personal account?

STATEMENT OF PROCEEDINGS AND FACTS

Defendant-Appellee (Defendant) is an incarcerated felon currently under the jurisdiction of the Michigan Department of Corrections. On or about January 13, 1997 Plaintiff-Appellant (State Treasurer) filed the underlying action with the Clinton County Circuit Court. The State Treasurer sought to recover, on behalf of the Michigan taxpayers, a portion of the costs incurred as a result of Defendant's incarceration. The action was filed pursuant to the State Correctional Facilities Reimbursement Act (SCFRA). MCL 800.401 et. seq.

On or about January 24, 1997 Defendant filed a "Counter Claim" which Plaintiff treated as an answer. In it Defendant objected to the prison reimbursement case based upon his assertion that his conviction was "illegal."

On or about March 10, 1997, after a hearing at which Defendant's wife (Joann Abbott) was present, Hon. Randy L. Tahvonen issued a Final Order which instructed at paragraph 3 that "Defendant Thomas K. Abbott shall immediately direct General Motors Corporation, its subsidiary or designee, to cause any pension payments due Defendant Thomas K. Abbott to be made payable to "Thomas K. Abbott, #248667" at: PRISON ADDRESS...." (Plaintiff's Appendix at 8a). Payments were to be directed in this manner until the release of Mr. Abbott from "the physical custody of the Department of Corrections." Once received by the prison, the warden was to act in the continuing capacity as receiver and cause the funds to be deposited into Mr. Abbott's account. After deposit the warden was to leave $20.00 for Mr. Abbott's use and disburse 67% to Joann Abbott based upon Defendant's obligations to provide her with support. The remaining 33% was to be paid to the State as reimbursement for incarceration expenses (Id. at paragraph 5).

Also at the conclusion of the same hearing, the Court issued an Order to be served on General Motors should Defendant fail to comply with the previously discussed Final Order. This second order informed General Motors of the existence of the first order requiring that Mr. Abbott's pension was to be sent to him at Southern Michigan Correctional Facility, 4002 Cooper Street, Jackson, MI 49201 (Plaintiff's Appendix at 8a).

On or about January 23, 1998 Defendant filed a "Writ of Mandamus" and a proposed "Counterclaim." In addition to objecting to the Trial Court having ruled on a dispositive motion rather than holding a jury trial, these raised the issue of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §1000 et. seq., and whether its non-assignment provision precluded the State's action.

On or about January 28, 1998 the Trial Court reviewed the "Complaint for Writ of Mandamus" and proposed "Counterclaim" and "determine[d] them to be a motion for reconsideration" which the Court then Denied. (Plaintiff's Appendix at 13a).

Defendant filed a Delayed Application for Leave to Appeal with the Court of Appeals on or about March 3, 1998, just under one year from the date of the entry of the Final Order. On December 4, 1998, the Court of Appeals issued an Order denying Defendant's Delayed Application for Leave to Appeal to that court "for lack of merit in the grounds presented." (Plaintiff's Appendix at 15a).

Defendant then filed an Application for Leave to Appeal in the Michigan Supreme Court. On November 9, 1999 this Court entered an Order remanding the case to the Court of Appeals for "consideration as on leave granted." (Docket No. 113970, Plaintiff's Appendix at 16a).

On December 28, 2001 the Court of Appeals reversed the Trial Court and held that the order requiring Defendant to reimburse the taxpayers conflicted with, and was preempted by, ERISA. (Plaintiff's Appendix at 17a). The Court of Appeals focused on the fact that the transfer of the pension funds from the pension source into Defendant's prison account was occurring "against defendant's will" (Slip Opinion at 4). The Court of Appeals failed to even address the preliminary question of whether requiring Defendant to cause his pension payments to be sent directly to himself could properly be construed as assignment or alienation of his funds. Additionally, because the Court of Appeals found that the transfer of the funds to Defendant's own account was a violation of ERISA, it did not address the question of whether the funds retained any ERISA protection after their deposit. On April 30, 2002, this Court granted the Treasurer's Application for Leave to Appeal.

ARGUMENT

I. Because the funds are never assigned or alienated, neither federal statute nor case law is violated where a trial court orders pension recipients to cause their pension payments to be sent to themselves.

A. Standard of Review

This case presents a question involving statutory construction, which is a legal question. Questions of law are to be reviewed de novo. *Fredericks v Highland Twp*, 228 Mich App 575, 583 (1998).

B. Analysis

The Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §1000 et. seq. provides at Section 1056(d)(1) that "benefits provided under the [retirement] plan may not be assigned or alienated." "The purpose of ERISA's proscription on alienation and assignment is to protect an employee from his own financial improvidence in dealing with third parties." *Roberts v Baugh*, 986 F Supp 1074, 1076 (ED Mich, 1997), (citing *Stinner v Stinner*, 554 A2d 45, cert den, 492 US 919 (1989).

As such, courts are prohibited from ordering that pension payments be sent to anyone other than the individual who earned them. This ensures that the benefits actually reach the recipient at the time when they may be needed. Nowhere in ERISA is there any language that would prevent a court from requiring that pension recipients cause the benefits to be sent directly to themselves. Indeed, any such prohibition would be contrary to ERISA's intent that this is precisely where the funds should go.

Defendant is an inmate serving a sentence with the Michigan Department of Corrections. His current address is therefore the specific institution in which he resides. A requirement that Defendant cause his benefits to be sent, payable in his name, to his address does not violate

ERISA's prohibition of assignments or alienation under any reasonable definition of these terms, nor is it contrary to ERISA's intent that the money go directly to the pensioner.

Upon arrival in an institution's mailroom, checks are deposited into the individual accounts of the inmates to whom they are payable. Here, Defendant's check would be deposited into Defendant's account, satisfying ERISA's intent to ensure that the funds reach him. As explained more fully in argument II below, once deposited into a pension recipient's personal account, case law clearly establishes that the provisions of ERISA cease to apply. At the moment ERISA no longer applies, the pension benefits are simply a cash asset of the recipient.

The State Correctional Facilities Reimbursement Act (SCFRA), MCL 800.401 et. seq., permits Michigan's taxpayers to be reimbursed when it is determined by a circuit court that prison inmates have sufficient assets to take responsibility for at least a portion of their own care. Given the opportunity to address SCFRA as it applied to State of Michigan employee pensions, (governmental pensions are not covered by ERISA), this Court examined the history of the statute and found that its purpose "was to ensure that prisoners shoulder the burdensome cost of their incarceration, to the extent possible, rather than law-abiding taxpayers." *State Treasurer v Schuster*, 456 Mich 408, 413 (1998). Finding in part that SCFRA's intent as stated was not directly in conflict with the Michigan statute(s) protecting state employee pensions, this Court in *Schuster* found that the State could bring prison reimbursement suits against not only the inmate-pensioner, but also directly against the government pension source itself. (Id.)

If ERISA assures the ability to pay for one's own living expenses, SCFRA codifies the responsibility to do so. Requiring Defendant to cause his pension to be sent to him honors both the letter and spirit of both ERISA and SCFRA. Neither Defendant nor the Court of Appeals states any basis for a finding to the contrary.

The Court of Appeals below correctly noted that "[t]he anti-alienation rule extends to voluntary and involuntary assignments such as garnishments." (Plaintiff's appendix at 18a, citing *Commercial Mortgage Ins, Inc v Citizens Nat'l Bank of Dallas*, 526 F Supp 510 (ND Tex, 1981), emphasis added). However, the Court then proceeded to deny reimbursement under SCFRA on the ground that "defendant did not voluntarily change his pension address to his prison address and did not voluntarily have the pension funds deposited into his personal prisoner account, but rather was ordered by the court to do so." (Id at 4, emphasis added). The Court of Appeals correctly stated the rule, but misapplied it by focusing on the wrong factor. The question the Court of Appeals should have addressed was not whether Defendant's acts were voluntary – the question should have been whether putting Defendant's money into his own personal account constitutes an assignment. It does not.

The Court of Appeals below purports to rely on Black's Law Dictionary's definition of "assignment" to support its result. The definition includes, "The act of transferring to another...." "A transfer or making over to another...;" and " . . . transfers of all kinds of property...." (*Plaintifff's Appendix* at 20a, emphasis added). Here again, the Court of Appeals is skipping over the first and most important question. How can the requirement that Defendant cause his own funds to be placed into his own account be characterized as a "transfer" "to another"? The simple answer is that it cannot, because it is not an assignment.

Defendant's argument, and the Court of Appeal's apparent conclusion, that prison reimbursement may never come from funds that derive from a pension is based upon too broad a reading of *Roberts v Baugh*, 986 F Supp 1074 (ED Mich, 1997), and its interpretation of ERISA. While *Baugh* does prevent the State from directly suing a pension source in order to redirect payments, it should not be expanded to prevent a court from requiring individual recipients (over whom the court has jurisdiction) to cause their pension to be made payable to themselves and sent to their current address. (Further, while the *Baugh* opinion would be entitled to respectful consideration if it were found to be on point, it would still not be binding on this Court. *Yellow Freight System, Inc v Michigan,* 464 Mich 21, 29, note 10 (2001).

In *Baugh*, the District Court's focus was on the pension source, which the court ultimately ruled had improperly been made a party defendant to the suit. It was the pensioner's employer Chrysler Corporation that had filed the motion for summary judgment (seeking to avoid making payment directly to the State) that the court granted. What the District Court objected to in *Baugh* was that the state had requested "that (the) Court order the [pension] Plan to mail Mr. Baugh's pension benefits to him...." (Id. at 1076, emphasis added). Thus, noted the court, "defendant Chrysler Corp. would not be voluntarily depositing the pension funds into Mr. Baugh's personal prisoner account but would be doing so only by court order." (Id. at 1077, emphasis added). The *Baugh* Court rejected "plaintiff's [State Treasurer's] claim against defendant Chrysler Corp. and defendant Baugh...." (*Id.* at 1078, emphasis added).

If he is permitted to cause his pension funds to be sent anywhere else, (here apparently to his wife), Defendant would in effect be assigning these "unassignable" funds to a third party who would then have the ability to use the funds in his or her own interests. Contrast this third party's unrestricted control of the funds with the limited control the State seeks. While the third party can do with the funds as he or she wishes, the warden would be restricted to the removal of a judicially determined amount to be used to cover a portion of Defendant's cost of care, the very living expenses ERISA contemplates that protected funds be used for. If either process violates ERISA it is the one that facilitates transfer of the funds to another party in order to subvert the State's ability to cause Defendant to pay a portion of his own living costs.

Were Defendant to voluntarily cause his pension checks to be sent to the prison for deposit into his account, no stretch of the imagination would call it an assignment. As the Court of Appeals correctly noted, ERISA's prohibition applies equally to both voluntary and involuntary assignments. Defendant's causing his funds to be sent to himself cannot, therefore, be transformed into an assignment simply because it is not voluntary on his part. The Court of Appeals was wrong to conclude that it did and this Court should reverse the decision below.

II. ERISA does not apply to funds after deposit in Defendant's personal account, regardless of the source of the funds.

A. Standard of Review

Questions of law are to be reviewed de novo. *Fredericks v Highland Twp*, 228 Mich App 575, 583 (1998).

B. Analysis

Once in the pension recipient's account, "It is generally true, as noted by plaintiff, that <u>pension money loses its exempt character once it passes into the hands of the beneficiary</u>." *Cunningham v Herr*, 198 Mich App 258, 261(1993), citing *McIntosh v Aubrey*, 185 US 122; (1902) and *In re Prestien*, 427 F Supp 1003, 1007-8 (SD Fla, 1977) (emphasis added). This general rule is consistent with other jurisdictions and should be applied here.

The Ninth Circuit Court of Appeals squarely addressed this issue in *Wright v Riveland*, 219 F3d 905 (CA 9, 2000). *Wright* involved a Washington statute that provided for the automatic deduction of 35% from any funds an inmate received from an outside source. The questioned statute, RCW 72.09.111(1)(a), provided that the Department of Corrections tender 15% to enforcement and victim-related funds and "Twenty percent to the department to contribute to the cost of incarceration." (*Id.*).

The Plaintiff in *Wright* represented a class of inmates who sued the Washington Department of Corrections challenging the legality of the statute on a number of grounds including a claim that the non-alienation language of 29 USC 1056(d)(1) barred deductions from benefits distributed under ERISA-governed pension plans. The Court determined that "alienation" and "assignment" are intended to cover only those arrangements that generate a right enforceable against the plan. Therefore, the court found that benefits are protected by the provision only while within the control of the pension plan managers. As such the *Wright* court concluded that Section 1056(d)(1) "does not preclude the Department [of Corrections] from deducting funds pursuant to the Statute from benefits received from ERISA-qualified pension plans." (*Wright* at 921).

A contrary finding that pension funds remain untouchable even after receipt, would result in an absurd interpretation of ERISA as it would relate to any claim to monies derived from a retiree's pension. Can a retiree whose assets include $10,000.00 of paid pension benefits in savings really refuse to pay a $5,000.00 credit card balance? Can (s)he declare bankruptcy and discharge the debt outright even while maintaining a savings account with a balance which exceeds total debt? Followed to its only logical conclusion, Defendant's argument here incorrectly would require "yes" answers to both questions.

The cases of *Trucking Emp of North Jersey v Colville*, 16 F3d 52 (CA 3 1994) (the pension fund can recover overpayments made to the pensioner where those funds are in the pensioner's bank account), *Guidry v Sheet Metal Wkrs Int'l Ass'n*, 10 F3d 700 (CA10 1993) (a union can recover from pension payments sent to a former union pension fund trustee after the payments have been deposited into the former trustee's bank account), and *Brosamer v Mark*, 561 NE2d 767 (Ind., 1990) (a judgment creditor can garnish funds paid pursuant to an ERISA-protected pension once the funds have been deposited into the pensioner's bank account), are illustrative. In each of the above cases the court examined the non-alienation language of ERISA at length. Each then concluded that ERISA protects benefits only until such time as they are actually paid to the recipient.

The ERISA provision in question, 29 USC §1056(d)(1) states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." By contrasting the benefits provided language with the language of the Social Security Act (the act raised by Defendant in his first Federal preemption challenge), which specifically states "none of the moneys paid or payable...under [the act] shall be subject to execution, levy, attachment, garnishment, or other legal process," (42 USC 407(a), (emphasis added)), one sees that Congress knows how to legislate restrictions on funds after receipt when it wishes to do so. In finding that the Social Security Act language does protect Social Security funds after receipt by the beneficiary, but that the ERISA language protects ERISA-qualified pension benefits from garnishment only until the point of receipt, the Supreme Court of Indiana stated:

> "We think that both the words of the statute and the legislative history demonstrate Congressional intent to assure only that funds promised retirees by their private employers actually reach the retirees without being dissipated or diverted before they ever leave the hands of the plan's trustee." *Brosamer*. at 771.

Or, as stated by the U.S. Court of Appeals for the Tenth Circuit:

> "We infer Congress made a deliberate decision retirement income paid and received was not thereafter protected from garnishment." *Guidry* at 712.

The language chosen by the U.S. Congress for ERISA ensures that pension funds reach the intended recipient. The public policy is a good one, protecting a pensioner's ability to provide for current living expenses, in spite of old debts. The statute functions as a shield protecting the pensioner, and the pension system, from having the funds diverted before they are paid out. It should not, without clearly expressed legislative intent, be converted into a sword with which the recipients can eliminate legitimate contemporaneous obligations. This is particularly true here where the State must, pursuant to a trial court's sentencing order and as a result of Defendant's own criminal wrongdoing, provide for the very necessities (food, shelter, etc.) the pension funds are intended to secure. In *In re Vary Estate*, 401 Mich 340, 353 (1977);

cert den, 434 US 1087 (1978), this Court held that it will look to intent, and not narrowly read a statute protecting a benefit (Social Security benefits in *Vary*) in order to "create a conflict where there is none."

Also instructive is the case of *In re Prestien*, 427 F Supp 1003, 1007-8 (SD Fla, 1977). *Prestien* involved a Florida statute that exempted disability income benefits from legal process but which was held not to exempt from bankruptcy proceedings, a savings account into which such benefits had been deposited. The *Prestien* Court stated at pp. 1005-6:

> A bankrupt cannot accumulate wages in a savings account while living on the credit of others, and then expect such accumulated wages to be exempt in bankruptcy. Neither should a disabled bankrupt be permitted to accumulate his "wages", i.e. his disability payments, refusing to apply them toward his normal expenses, and thereafter expecting them to be exempt.
>
> Finally, allowing sums already paid to remain exempt creates a host of problems without any evident legislative solutions. When do the funds cease to become exempt? In the old decision of Hathorn v. Robinson, 96 Me 33, 51 A 236 (1901) the court, finding itself confronted with such a problem, remarked:
>
>> If the effect of this statute is to continue the exemption after the money has come into the possession of the beneficiary, such exemption might perhaps be claimed to follow the money, so long as its identity was preserved, in investments and in the purchase of property not otherwise exempt from attachment. As to this we, of course, do not intend to express an opinion; we refer to it merely to show that the consequences of such a continuing exemption are too important, and the questions involved in such a construction are too serious to permit us to give an effect to this statute far beyond that which would naturally follow from the ordinary meaning of the words used.

Both of the concerns raised by the *Prestien* Court are equally compelling in this instance. Should Defendant, or any incarcerated felon, be permitted to live at the expense of the taxpayers who must pay for his food, clothing and the like while simultaneously accumulating pension payments, yet still expect such accumulated funds to be exempted from attachment by the taxpayers? Plaintiff believes no such result is required and no such exemption should attach. If it were to apply, where would the exemption end? Would it extend to purchases of investments or property made with pension-derived funds? There is no guidance in the statute. Plaintiff contends that Congress did not address the issue of how far beyond receipt protection was extended, because Congress intended the exemptions to cease immediately upon the receipt of the benefits by the pension recipient.

While it can be argued that every creditor should be protected from a pension recipient who would simultaneously accrue both pension funds and debt, this court need not make so broad a finding in this case. This Court can limit its holding to cases involving prison reimbursement which is a statutory obligation and not a simple debt.

As previously noted by this Court:

> ...the state when considering pension payments according to the reimbursement act, is not a "creditor," nor is the relationship between a prisoner and the state a typical debtor-creditor relationship.

State Treasurer v Schuster, 456 Mich at 419 (emphasis added) (finding SCFRA controls over the non-alienation language of Michigan's Public School Employees Retirement Act). See also *State Treasurer v Gardner*, 459 Mich 1 (1998) (finding SCFRA takes priority over the Federal Consumer Credit Protection Act).

The State does not voluntarily agree to provide an inmate with room and board any more than an inmate voluntarily moves into a correctional facility. Both occur only upon order of a circuit court rendering a felony sentence for a term of years. An inmate, therefore, has a statutory obligation pursuant to SCFRA to reimburse the State for that which the State provides at the behest of an order of the court.

It is this unique relationship between a prisoner and the State that permits control over Defendant's personal account and the funds contained therein. It is also this unique relationship that explains why there are no previous cases directly on point, and why a holding permitting the

Michigan taxpayers to recover a portion of the funds they spend on Defendant's care need not have a broader effect on the vulnerability of ERISA-protected payments.

The restrictions on pension alienation attempt to prevent a situation in which a debtor is so stripped of his or her assets as to result in their being unable to provide for necessities such as food, clothing, and shelter. This prevents the pensioner from becoming a ward of the State's taxpayers. In prison reimbursement cases, the inmate is for practical purposes already a ward of the State of Michigan. Food, clothing, and shelter are being provided to the inmate by the State and as such the inmate does not need the pension checks for these purposes. Denying the State reimbursement in this instance serves no purpose other than to reward Defendant with an unwarranted profit as he receives his food, clothing, and shelter at taxpayer expense, while simultaneously amassing the funds with which to purchase them.

Neither *Baugh* nor ERISA is applicable in this instance. There being no basis for the Court of Appeals opinion preventing the state's taxpayers from being reimbursed for that which they are providing to Defendant, it should be reversed.

CONCLUSION

ERISA states "benefits provided under the pension plan may not be assigned or alienated." The Court of Appeals conclusion, that this language permits Defendant to direct his pension funds to a third party, but prevents a court from ordering Defendant to cause the funds to be sent directly to himself, is erroneous. The intent of ERISA that <u>pensioners should be able to pay their own way</u> is not in conflict with the intent of SCFRA, which is that <u>inmates should be required to pay their own way</u>.

Whether the actions are voluntary or not, pension recipients who cause pension payments to be sent to themselves cannot be said to be "assigning" or "alienating" the funds. Therefore the trial court's order that Defendant direct his pension to be made payable to himself and sent to him for deposit into his own account does not violate ERISA. The Court of Appeals' focus on whether the "assignment" was voluntary, without first determining whether or not it was in fact an assignment at all, is flawed and caused that court to reach the wrong result.

An order that causes funds, after deposit into the inmate's account, to be used to reimburse the taxpayers for expenses relating to the inmate's care likewise does not violate ERISA. Once the pension recipient receives funds, ERISA's protections no longer apply. ERISA has no applicability to the facts presented by this case, and the Court of Appeals ruling that ERISA's prohibitions are controlling should be REVERSED.

RELIEF SOUGHT

The Michigan State Treasurer therefore requests that the Court of Appeals be REVERSED and the order of the trial court REINSTATED.

Respectfully submitted,

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Date: June 19, 2002
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